

Virginia Interagency Advisory Council on Administrative Dispute Resolution

Minutes

April 29, 2008 Meeting
Richmond, Virginia

Present: Kim Farrar, Deputy Secretary of Administration; Claudia Farr, Lead Staff; Joice Conyers; Debbie Howe; Fred Kozak; Steve Marzolf; Carol Mitchell; Marty Parrish.

Kim Farrar called the meeting to order at approximately 10:00 a.m.

Marty Parrish gave an update from the Data Subcommittee on recent Council proposals to fund empirical research on the Commonwealth's litigation costs. Although funding was not granted, inroads were made in identifying potential sources of data such as the Department of Treasury's Division of Risk Management, the Department of Accounts, Department of General Services, and Department of Transportation. The Council expects to have research assistance four to five weeks this May and June from a University of Virginia Law School intern working on a volunteer basis for the Department of Employment Dispute Resolution. With this research assistance, it is expected that the various sources of publicly available litigation cost data can be identified, along with the associated data fields and available reports. The possibility of future studies of state agency ADR programs was also discussed.

Carol Mitchell gave an overview of the ADR program she directs at the Department of Professional and Occupational Regulation. She also reported on behalf of the Policy and Implementation Subcommittee that a letter to all agency Dispute Resolution Coordinators has been drafted to update their information and elicit their input on training and other needs. In addition, Carol described the progress of a "Conflict Management for Leaders" workshop planned by the Council in partnership with the Department of Employment Dispute Resolution and the Department of Human Resource Management. Claudia Farr reported that a seminar on ADR contract clauses is also being planned for 2008, probably early summer.

Joice Conyers presented a draft statutory amendment to the Virginia Administrative Dispute Resolution Act that would specify term lengths and manner of term staggering for future Council appointees. It was suggested that the proposed amendments also clarify that the Council service of the Director of the Department of Employment Dispute Resolution (EDR) is coincident to his or her appointed term as the EDR Director.

There was valuable discussion on the above topics by those present, including how best to assure that state agency managers receive adequate training in effective communications, interest-based negotiation, and conflict management; potential private sector ADR resources that could be of assistance with Council projects; and how to promote the use of ADR clauses in state agency contracts.

The meeting adjourned at approximately 12:00 noon.

(ATTACHMENTS: Executive Summary and draft statutory amendment)

Executive Summary: **Increasing State Government Effectiveness With Alternative Dispute Resolution (ADR)**

What is the Need?

Unresolved conflict in business and governmental organizations comes at a high cost. Although many successful businesses have long been using innovative alternative dispute resolution (ADR) tools, Virginia's state agencies as a whole have not. Nor does the Commonwealth's Executive Branch, as an enterprise, have an effective, sustainable strategy to manage *early on* through ADR the array of disputes it confronts, and to avoid the associated risks and loss of unresolved conflict.

Litigation, a traditional approach to resolving conflict, is costly. Between FY1985 and FY2006, \$67.8 million was spent from the state's insurance reserve fund according to publicly available data at the Dept. of Treasury's Division of Risk Management. In addition, new federal court rules now require "e-discovery," a litigation process involving the retention, preservation, and production of electronically stored information. Costs for "e-discovery" in a typical litigated case have been estimated to range from \$50,000 to \$200,000.

Why is the need not being met?

ADR has not been systemically implemented in the Executive Branch for several reasons. First and foremost, there is not enough empirical data and business intelligence on the Commonwealth's claims-related costs, areas of greatest exposure, or where ADR could have the best impact on the state budget in terms of cost savings, cost avoidance, increased value and return on investment. Other reasons include the common misconception that ADR is a "feel good," soft approach to business problem-solving (a misconception belied by the "no-nonsense" proponents of ADR such as the Air Force, Army Corps of Engineers, NCR, KBR, Inc., and Motorola); the very human tendency to view a fundamental change of approach to doing business with some resistance; and a lack of seed funding to develop enterprise capacity to use ADR effectively.

What are the impacts of this opportunity?

Organizations adopting ADR processes report 50%-80% reductions in litigation costs. (See Thomas Stipanovich, ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution (2004)). In the federal sector, ADR has been successful in resolving over two thirds of the U.S. Attorneys' cases where it was used, including medical malpractice, employment discrimination, motor vehicle torts and personal injury torts, at significantly less time and expense (Jeffrey M. Senger, *Evaluation of ADR in United States' Attorneys' Cases*, United States Attorneys' Bulletin, November 2000, United States Department of Justice Executive Office for U.S. Attorneys.)

Other positive impacts of the systemic use of ADR include:

- Kellogg, Brown and Root (now KBR, Inc.) reported an 80% reduction in outside litigation costs (David B. Lipsky and Ronald L Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, Cornell

Institute on Conflict Resolution, with the support of PricewaterhouseCoopers LLP (1998)).

- Motorola reported a 75% reduction in litigation costs over a period of six years (Id.)
- NCR, Inc. reported a 50% reduction in litigation costs and a drop in pending lawsuits from 263 in 1984 to 28 in 1993 (Id.)
- Department of the Air Force reported ADR usage in contract disputes avoided an average of \$57.6 million in liability in each of the most recent five years, FY2002 through FY2006 (Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government, April 2007 (Federal Interagency Alternative Dispute Resolution Working Group and Agencies in the Executive Branch of the Federal Government))
- Federal Aviation Administration reported ADR usage resulted in shorter resolution timeframes: bid protests took an average of only 24 calendar days; and contract disputes an average of only 67 calendar days (Id.)
- Army Corps of Engineers reported that over the past ten years it has processed 131 contract disputes through ADR and resolved 90% of them. (Id.)
- Department of Health and Human Services, Center for Medicare & Medicaid Services Office of Hearings reported a 90% success rate for resolving provider reimbursement appeals through ADR, within a shorter time (within 180 days as opposed to several years for litigation) and at less cost (\$750 as opposed to \$11,500 for a formal hearing) (Id.)

With results like this from ADR, the Commonwealth's tax dollars and staffing resources could be used for advancing core business activities rather than for litigation and related expenses and activities.

What actions need to be taken to address this opportunity?

To address this opportunity strategically, the Commonwealth must develop the needed business intelligence and must have adequate staffing. With a modest amount of seed money, a part-time project director would be hired to staff the interagency ADR Council. In addition, a qualified consultant would be retained to research and develop, in conjunction with the Council, findings and recommendations on the extent to which ADR would increase the effectiveness of state government operations and services. The findings and recommendations would also target particular areas where the use of ADR would reap the highest return on investment, as well as areas where ADR may not be well-suited. This would in turn enable the Council to align available resources accordingly, with related milestones and measures.

DRAFT – 4/29/08

§ [2.2-4118](#). Interagency Dispute Resolution Advisory Council.

A. The Interagency Dispute Resolution Advisory Council is hereby created as an advisory council to the Secretary of Administration.

B. The Council shall consist of two dispute resolution coordinators from each Secretariat appointed by each Secretary, the Director of the Department of Employment Dispute Resolution, and three persons who are not employees of the Commonwealth, at least two of whom have experience in mediation, appointed by the Governor. The appointees who are not employees of the Commonwealth may be selected from nominations submitted by the Virginia Mediation Network and the Virginia State Bar and the Virginia Bar Association Joint Committee on Alternative Dispute Resolution, who shall each nominate two persons for each such vacancy. In no case shall the Governor be bound to make any appointment from such nominations. The Secretary of Administration or his designee shall serve as chairman of the Council.

C. Initial appointments by the Governor shall be staggered as follows: two members for a term of two years and one member for a term of three years. Initial appointments from each Secretariat shall be as follows: one member for a term of two years and one member for a term of three years. Thereafter, appointments shall be for terms of three years, except appointments to fill vacancies, which shall be for the unexpired terms. No appointed Council member shall serve more than two consecutive three-year terms. Service of the full term by an appointed Council member is not mandatory. The remainder of any term to which a member is appointed to fill a vacancy shall not constitute a term in determining the member's term limit. Vacancies shall be filled within thirty (30) days upon receipt of the resignation from a Council member. Members shall take office at the first regularly scheduled Council meeting following appointment.

D. The Council shall have the power and duty to:

1. Conduct training seminars and educational programs for the members and staff of agencies and public bodies and other interested persons on the use of dispute resolution proceedings.
2. Publish educational materials as it deems appropriate on the use of dispute resolution proceedings.
3. Report on its activities as may be appropriate and on the use of dispute resolution proceedings, including recommendations for changes in the law to the Governor and General Assembly.

E. Every state agency shall cooperate with and provide such assistance to the Council as the Council may request.